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U.S. DEPT. OF JUSTICE

No. 646

In the Supreme Court of the United States

OCTOBER TERM, 1937

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY  
AND WARREN C. SCHWARTZ, TRUSTEE IN BANK-  
RUPTCY OF A & S ELECTRIC CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1967

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No. 616

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY  
AND WARREN C. SCHWARTZ, TRUSTEE IN BANK-  
RUPTCY OF A & S ELECTRIC CORP., PETITIONERS

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question involved is whether unpaid employer contributions to a union retirement fund have priority under the Bankruptcy Act over the government's claim for unpaid taxes. Relying on this Court's decision in *United States v. Embassy Restaurant*, 359 U.S. 29, the court below held that these contributions do not fall within the purview of "wages \* \* \* due to workmen," as that phrase is employed in Section 64(a)(2) of the Bankruptcy Act, c. 541, 30 Stat. 544, 563, as amended (11 U.S.C. 104). This decision is plainly correct, and there is no conflict or other basis for further review.

This case is indistinguishable from and is fully controlled by *Embassy*. The contributions here, as there, offered no meaningful support to the participating employee during periods of economic displacement. Hence, they did not satisfy the purpose underlying the priority the Bankruptcy Act gives wages: "That purpose was to provide the workman a 'protective cushion' against economic displacement caused by his employer's bankruptcy." 359 U.S., p. 33. Further, as this Court recognized in *Embassy*, the wage priority statute is concerned with debts due directly to employees. The debtor-creditor relationship here, as in *Embassy*, was between the employer and third parties—the trustees of the fund. The employees were never entitled to enforce the employer's obligations, and they never had any right, title or interest in the fund other than in relation to their eligibility for such benefits as might be established upon their retirement. (R. 53a.)\* These are quite different from the type of employer-employee debt that the Bankruptcy Act contemplates would, through a priority, give employees economic assistance during the short-term dislocation that arises from the employer's bankruptcy.

There is not, as petitioner contends (Pet. 3-4), a conflict between the decision below and the decision of the Court of Appeals for the Ninth Circuit in *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F. 2d 768. In *Sulmeyer* the contributions were to a Vacation and Holiday Benefit Fund in the

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\* "R." refers to the appendix to the brief for the appellant in the court of appeals.

amount of seven and one-half percent of the gross pay of each participating employee. Thus, unlike the present case, no flat sum was involved; rather, the contributions varied directly according to wages and hours worked. Moreover, the contributions in *Sulmeyer* were placed in savings accounts in the names of individual employees and were paid over to the employees on a semi-annual basis. The contributions thus provided each employee with the "protective cushion" against economic displacement that this Court found lacking in *Embassy*.

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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